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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
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Request for Review of the Decision of the)
Universal Service Administrator by)
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San Diego Unified School District)
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Schools and Libraries Universal Support)
Mechanism)

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Federal Communications Commission
Office of Secretary

File No. SLD-339004

CC Docket No. 02-06

To: The Commission

**REQUEST FOR REVIEW OF THE DECISION
OF THE UNIVERSAL SERVICE ADMINISTRATOR,
OR IN THE ALTERNATIVE, REQUEST FOR WAIVER
BY THE SAN DIEGO UNIFIED SCHOOL DISTRICT**

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Pursuant to Section 54.719(c) of the rules of the Federal Communications Commission (“Commission”), the San Diego Unified School District (“District”), by its counsel, hereby submits this Request for Review of the Decision by the Universal Service Administrator, Schools and Libraries Division (“SLD”) that denied the District’s request for funding for internal connections products and services for Funding Year 2003 (“*SLD Decision*”).¹ The stated basis for the SLD’s denial was that “price was not the primary factor” in selecting the service providers’ proposals.

Because novel questions of fact, law, and policy are raised herein, the District respectfully requests that the Commission conduct a *de novo* review of this Request for Review pursuant to Section 54.723(b).

¹ Administrator’s Decision on Appeal – Funding Year 2003-2004 (Dec. 20, 2004) (included herein as Attachment 1); *see also* Funding Commitment Decision (April 13, 2004) (included herein as Attachment 2).

I. INTRODUCTION.

A. Summary of the Request for Review.

The SLD applied the wrong legal standard in reaching its decision. Commission rules state that the District “*must select* the most cost-effective offering,” but that “price *should be* the primary factor considered.”² The SLD incorrectly held the District to a higher standard – that price “*must be* the primary factor.”³ In confusing the mandatory requirement for “cost-effectiveness” with the aspirational requirement for “price,” the SLD reached the wrong decision, since the facts indisputably demonstrate that, at a minimum, the District selected the most cost-effective provider and gave great weight to pricing. And in equating the general “cost-effective” standard with the pricing factor used to help “determine[e]” cost-effectiveness, the SLD has turned the meaning of Section 54.511(a) on its head. Even if the SLD applied the correct standard, it did so retroactively to the detriment of the District and in contravention to a long line of federal cases requiring clear notice in the event the Commission adopts a stricter interpretation of its requirements.

Pursuant to new rules adopted in August 2004, FCC Form 470 now requires applicants to certify that “[a]ll bids submitted will be carefully considered and the bid selected will be for the most cost-effective service or equipment offering, with price being the primary factor, and will be the most cost-effective means of meeting educational needs and technology plan goals.”⁴ This addition, made as a consequence of the Commission’s December 2003 *Ysleta* decision,⁵ provides further evidence that the Commission’s rules, cases and public information lacked

² Section 54.511(a) (emphases added).

³ SLD Decision, p. 2.

⁴ See Schools and Libraries Universal Service Support Mechanism, *Fifth Report and Order and Order*, 19 FCC Rcd 15808 (2004) (“*Fifth Report and Order*”) at 15831.

⁵ *In the Matter of Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District, et al.*, 18 FCC Rcd 26406 (2003) (“*Ysleta*”).

clarity at the time the District submitted its Year 2003 application. The District should not be made to suffer denial of its funding request in these circumstances.

Even so, price was the primary factor in the selection of the District's four service providers and in the subsequent award of 35 projects to those four service providers. The District's methodical and careful process ensured that the District met the E-rate program goals of maximizing the benefits of the E-rate discount mechanism, while limiting waste, fraud, and abuse. The *SLD Decision* should therefore be reversed and the District's application should be reinstated.

In the alternative, the District requests that the Commission waive strict application of the newly-stated requirements imposed by the *Ysleta* decision. The particular facts discussed below make strict compliance with Section 54.511(a) inconsistent with the public interest in light of the changes in policy that apparently were made long *after* the District submitted its Year 2003 application, depriving the District of adequate notice of the new standard. Moreover, the *SLD Decision* was issued well *after* the close of the application window for Year 2004, and because the District is therefore foreclosed from applying for E-rate funding for these projects until Year 2006, waiver is appropriate based upon considerations of the hardship that would be imposed upon the District, and would be consistent with the relief afforded the applicants in *Ysleta*. In short, a waiver is appropriate and would better serve the public interest than strict adherence to the newly-interpreted general rule.

B. Questions Presented for Review.

The questions presented for review are as follows:

1. Did the SLD improperly misconstrue Section 54.511(a), which states that price *should be* the primary factor, when it denied the District's Year 2003 application and stated that price *must be* the primary factor?

2. Did the SLD improperly hold the District to the new *Ysleta* standard when it denied the District's Year 2003 application, notwithstanding *Ysleta*'s acknowledged departure from past Commission decisions and the District's full compliance with the competitive bidding procedures in effect when *Ysleta* was released?
3. Even if the *SLD Decision* relied upon the correct legal standard, do the facts support that price was the primary factor throughout the District's extensive and thorough competitive bidding process?
4. If the District was required to show that price was the primary factor in selecting its service providers, should the Commission waive its rules because the particular facts of this case make strict compliance inconsistent with the public interest, thereby affording the District an opportunity to obtain E-rate funding for Year 2003?

The District requests that Commission reverse the *SLD Decision* and reinstate the District's Year 2003 application. In the alternative, the District requests that the Commission waive strict application of the newly-stated requirements imposed by the *Ysleta* decision and reinstate the District's Year 2003 application.

C. Information Required to Support the Request for Review.

In compliance with Section 54.721(b), the District submits the following information. The District is directly interested in the matter presented for review as the *SLD Decision* improperly denied E-rate funding to the District for Year 2003. A full statement of the relevant, material facts with supporting documentation is provided below in the Discussion below.

II. DISCUSSION.

Section 54.511(a) states as follows:

In selecting a provider of eligible services, schools, libraries, library consortia, and consortia including any of those entities shall carefully consider all bids submitted and *must* select the most cost-effective service offering. In determining which service offering is the most cost-effective, entities *may* consider relevant factors other than the pre-discount prices submitted by providers but price *should* be the primary factor.⁶

⁶ Section 54.511(a) (emphases added).

The process the District employed complied with this standard in every respect. As required, the District selected the most cost-effective offer, considering a number of factors relevant to its service requirements including, of course, the price of those services. Any failure to make price *the* primary factor, however, is not fatal to the District's funding request.

A. Facts Supporting the Request - Overview of Service Provider Selection Process.

As discussed in detail further below, the District placed a heavy emphasis on price when it selected its service providers for the District's Year 2003 projects, consistent with the legal standard then in effect. When the District awarded the specific projects for the Year 2003 funding cycle to the selected service providers, the District again placed a heavy emphasis on pricing.⁷ Because the District did not have the benefit of the Commission's decision in *Ysleta*, a case that changed the legal standard, the District did not employ a mechanical process that allocated a specific and easily-identifiable factor to price. However, it is clear that price was the one consistent and primary factor throughout the District's thorough four-step selection and award process.

First, the District released a "Request for Information for CMAS Certified Systems Integrators to Provide and Install Local Area Networks for Proposition MM Technology Upgrades at Specified School Sites" (the "RFI") which requested interested vendors to submit a pre-qualification questionnaire. To be prequalified, potential vendors had to show that they had competitively-bid multiple-award schedule contracts from which the District could purchase its E-rate funded services. As required by the Commission's Universal Service Order (discussed further below), the RFI provided vendors with "a complete description of services" sought by the

⁷ The District's Billed Entity Number is 143662.

District. Fifteen vendors submitted the questionnaires, and of these, four vendors were determined to be unqualified.

Second, the District solicited proposals from the remaining 11 vendors, with detailed pricing for 73 potential school projects. These 11 proposals were scored for responsiveness to the requirements of the RFI, with 50 (of the 100 available) points allotted to each vendor's "Technical Proposal." Price was not a factor in this step. Five proposals were discarded for failing to meet the District's minimum standards.

Third, the District scored the remaining six proposals, with 30 (of the 50 remaining available) points allotted to each vendor's pricing proposal. The District selected the top four scoring proposers as its potential Year 2003 service providers.

Fourth, and finally, the District asked the four selected vendors to provide new pricing proposals for 35 school sites. By soliciting new cost proposals, the District realized additional cost savings that ranged from 27% to 50% when compared to the prices in the vendors' original proposals. The District split the 35 sites into five packages and awarded the packages based upon an evaluation that emphasized pricing over all other factors. Through its previous experiences, the District knew that awarding the projects based solely upon price considerations would potentially result in a situation where one service provider would have more projects in the same phase of construction than it could reasonably accommodate. Accordingly, consistent with the rules permitting the District to consider other factors, the District also took into account its anticipated construction schedules for the school sites and service provider workload.

Each of the four steps is explained in detail below.

1. First Step – Through the Pre-qualification of Vendors with Competitively Bid Multiple Award Contracts, the District Emphasized Price as the Primary Factor in Selecting Qualified Vendors.

The District's establishing Form 470 (reference 6043310000362368) was submitted on or about August 30, 2001, in the Year 2002 cycle. On approximately September 5, 2001, the District issued the RFI.⁸ The RFI requires that service providers offer their services to the District pursuant to a valid California Multiple Award Schedule ("CMAS") contract.

Under CMAS, a vendor offers goods and services to state and local agencies – with corresponding prices – from an already existing competitively assessed, cost compared, multiple award contract. By using CMAS, the District was already assured of receiving services that had been awarded to a vendor who had provided the lowest competitive bid to a government agency.

The RFI required interested vendors to submit a pre-qualification questionnaire.⁹ To become pre-qualified, a vendor had to demonstrate, at a minimum, that they were CMAS certified, had the financial ability to perform, had the capability and previous experience required for the anticipated procurement, and had not been debarred.

While CMAS was the primary factor in the pre-qualification of vendors, the District did not quantify the pre-qualification factors. The District estimates that price (through the CMAS requirement) accounted for 75% of the District's pre-qualification consideration.

Fifteen potential vendors submitted a pre-qualification questionnaire. The District determined that four of the vendors were not qualified to submit a proposal, including two vendors who were not CMAS-qualified.¹⁰

⁸ The RFI and selected RFI appendices is included herein as Attachment 3.

⁹ RFI, pp. 4, 6-7, and RFI App. A.

¹⁰ See Memorandum to File, From Joanne Pilgrim, September 25, 2001 (included herein as Attachment 4).

2. Second Step – Selection of Vendors Capable of Meeting District and SLD Requirements.

The District invited the 11 pre-qualified firms to submit proposals. The vendors were required to submit a complete description of services, including the quantity, manufacturer, part number, price and labor cost, in addition to extensive information on the technical aspects of the equipment, for 73 school sites.¹¹

After the District received proposals from the 11 pre-qualified vendors, the District evaluated the proposals using a 100-point scale to determine which vendors were best able to provide the services to the District. This first round of evaluations was, in essence, designed to screen out the potential vendors that would have difficulty meeting the District's and the SLD's specifications and requirements.

Four evaluators reviewed the 11 proposals and assigned scores in four categories.¹² The four scoring categories were as follows:

1. Technical Proposal (Completeness of the information presented for the proposed equipment) – Maximum 50 points;
2. Technical Ability (Staff expertise; ability to meet requirements) – Maximum 20 points;
3. Past Performance (K-12 experience of the Systems Integrator [i.e., service provider] with proposed hardware on similar projects) – Maximum 20 points;
4. Overall responsiveness of the Proposal (purpose, scope and objectives) – Maximum 10 points.

Each of the four evaluators reviewed five or six proposals.¹³ The scores of each evaluator were then averaged.¹⁴

The scores received by the proposals were as follows:¹⁵

¹¹ RFI, pp. 18-19 and App. C.

¹² See spreadsheets entitled, "San Diego Unified School District, Request for Information for CMAS Certified Systems Integrators," Oct. 19, 2001 ("Evaluations") (included herein as Attachment 5).

¹³ See *id.*

¹⁴ See Master Evaluation, signed by each evaluator (included herein as Attachment 6).

1. Pacific Bell/SBC: 99 points
1. SAIC: 99 points
3. Verizon: 95 points
4. Vector: 91 points
5. IBM: 89.5 points
5. NEC: 86 points
7. Unisys: 81.5 points
8. Sysinct: 79 points
9. Networkworld Solutions: 54.5 points
10. Network Catalyst: 49.5 points
11. Siemens: 0 points

After these evaluations, the District determined that it would discard those proposals that received scores indicating that the proposers could not meet the District's and the SLD's requirements. On this basis, the District determined that the five proposals receiving less than 86 points should be discarded. Accordingly, the six remaining proposals were evaluated in the third step of the selection process.

3. Third Step – Evaluation of Pricing and References and the Selection of the District's Four Service Providers.

Even though CMAS contracts are previously competitively bid, the terms of the CMAS contracts allow the District to seek even lower prices, and the District's RFI requested the proposers' best price. In the third step of the selection process, the District evaluated pricing and references in the final six proposals and assigned scores in these two categories, as follows:

1. Pricing approach – Maximum 30 points;
2. Client references – Maximum 20 points.¹⁶

Clearly, price was the primary factor in this step.

The six proposals received the following scores in the third step of the selection process:

1. Pacific Bell/SBC: 32 points (12 (client references) plus 20 (pricing));
2. SAIC: 30 points (10 points (client references) plus 20 (pricing));
3. Vector: 29 points (19 points (client references) plus 10 (pricing));

¹⁵ See *id.*

¹⁶ See Memorandum to file, From Evan Leslie, Oct. 31, 2001 (included herein as Attachment 7).

4. Verizon: 27 points (7 points (client references) plus 20 (pricing));
4. IBM: 27 points (7 points (client references) plus 20 (pricing));
5. NEC: 23 points (3 points (client references) plus 20 (pricing)).¹⁷

The District then combined the scores from the second and third steps to arrive at the final scoring:

1. Pacific Bell/SBC: 131 points (99 (second step) plus 32 (third step));
2. SAIC: 129 points (99 (second step) plus 30 (third step));
3. Verizon: 122 points (95 (second step) plus 27 (third step));
4. Vector: 118 points (91 (second step) plus 27 (third step));
5. IBM: 116.5 points (89.5 (second step) plus 27 (third step));
6. NEC: 109 points (86 (second step) plus 23 (third step)).

Due to the quantity of anticipated E-rate projects, the District determined that it would require the services of four service providers. The District selected the top four proposers, Pacific Bell/SBC, SAIC, Verizon, and Vector, to be its proposed service providers, and entered into agreements with all but Verizon in December, 2001.¹⁸ The District and Verizon were not able to agree to mutually acceptable contract terms, and eventually decided not to enter into an agreement. The District then entered into a contract with IBM, the next highest-scoring proposer, in June, 2002.

In this third step, pricing was the primary factor, as 30 out of a possible 50 points were assigned to pricing. When the scores from steps 2 and 3 were combined, pricing was the second highest factor, compared to the 50 points assigned to technical proposals. It is notable that the difference in points between these two categories had no effect on the District's final selection of its service providers. For example, even if the District had ignored the scores from the second step and selected its service providers based solely on the scores in the third step, where price was clearly the primary factor, the District would have selected the same four service providers.

¹⁷ *Id.*

¹⁸ The agreements are included herein in PDF format on a compact disc as Attachment 8.

Furthermore, when the first three steps are viewed in total, it is clear that price was the primary factor in the District's selection of its service providers. As estimated above, price (through the CMAS requirement) accounted for 75% of the District's pre-qualification assessment. Price accounted for 20% (30 out of 150 points) of the District's consideration in steps 2 and 3 of the service provider selection process. Viewed as a whole, price was easily 40%, if not more, of the District's overall criteria. The technical proposal was not considered in the pre-qualification process and accounted for 33% (50 out of 150 points) of the assessment in steps 2 and 3. Accordingly, no other factor played as large a role in the process as price, and price was therefore the primary factor in the District's selection of its four service providers.

Finally, these first three steps were utilized only to select the District's service providers. The District did not award any contracts for Year 2003 projects at this point. Instead, as discussed in the next section, the District only awarded contracts after it solicited completely new pricing proposals from the pool of service providers – a process that resulted in significant additional cost savings of between 27% and 50% per project.

4. Fourth Step – When Awarding Specific Year 2003 Projects to the Four Service Providers, Price was the Primary Factor.

The contracts between the District and the service providers did not specify the school sites that would be assigned to each service provider for Year 2003. In the fourth step, the District selected approximately 35 schools that would be included within the District's Year 2003 Form 471 application,¹⁹ and ultimately divided those 35 school sites into five packages. Twenty-five school sites eligible for 90% funding were divided into four packages. Many, if not all, of the school sites were under construction for other projects unrelated to E-rate, and the E-rate projects are typically the final construction project at a site. The District placed the 25

¹⁹ The District's Year 2003 Form 471 Application Number is 339004.

school sites into the four packages so that the construction schedules for each package would be staggered, and a service provider would not have too many schools under construction (or at least in the same phase of construction) at the same time. The ten school sites that were eligible for 80% funding were placed into one single package.

Although the District had obtained substantial pricing information from the four vendors during the RFI process, the District determined that it could gain additional cost savings by asking the vendors to provide new cost proposals for these 35 school sites.²⁰ In fact, the District received pricing proposals from the four vendors that reflected substantial discounts over the initial proposals. For example, four school sites that were included in the initial RFI responses were also included in the District's list of sites for the Year 2003 Form 471. For these four schools, the second pricing proposal from the vendor selected to do the work was at least 27% less than the original proposal and was 50% less for one site.²¹ The total amount of savings on these four sites alone was almost \$450,000.²²

The package containing ten schools eligible for 80% funding was awarded to SBC, the low bidder for that package. Clearly, price was the major factor in the award of that package. With respect to the remaining four packages, the District awarded the packages based upon pricing, anticipated construction schedule and corresponding service provider availability, and service provider reputation. Although these factors were not quantified during the evaluation process, the District estimates that pricing accounted for 40% of the District's evaluation, construction schedule and vendor availability for that schedule accounted for 30% and past

²⁰ See Letters to vendors (Nov. 25, 2002) (requesting pricing for 25 sites eligible for 90% funding); Letters to vendors (January 24, 2003) (requesting pricing for 10 sites eligible for 80% funding) (included herein as Attachment 9).

²¹ See Comparison of Bids (included herein as Attachment 10).

²² *Id.*

vendor performance and reputation accounted for 30%.²³ Clearly price was the District's primary concern in the request for new pricing proposals and in the award of school sites, and price was therefore the primary factor in the District's award of the E-rate funded work.

B. The District Met the Commission's Competitive Bidding Requirements for the Award of E-Rate Contracts.

1. The SLD Applied the Wrong Legal Standard in Stating that Price "Must Be" the Primary Factor in Selecting Service Providers.

In the Telecommunications Act of 1996 ("Telecom Act"), Congress enacted Section 254 of the Communications Act of 1934, as amended. Section 254 directed the Commission, after receiving recommendations from a joint federal-state board, to adopt rules that would improve access to telecommunications service throughout the country. Congress stated that the Commission and the States "should ensure that universal service is available at rates that are just, reasonable and affordable."²⁴

In its *Recommended Decision*, the Federal-State Joint Board on Universal Service "recommend[ed] that the Commission adopt a rule that provides schools and libraries with the *maximum flexibility* to purchase whatever package of telecommunications services they believe will meet their telecommunications service needs most *effectively and efficiently*."²⁵ In following the *Recommended Decision*, the Commission, in adopting its universal service rules, declared that:

we note that the Joint Board intentionally did not recommend that the Commission require schools and libraries to select the lowest bids offered but rather recommended that the Commission permit schools and libraries "maximum flexibility" to take service quality into account and to choose the offering or offerings that meets their needs "most effectively and efficiently," where this is consistent with other procurement rules under which they are

²³ See Estimated Ranking of Year 2003 Pricing Proposals (included herein as Attachment 11); see also Summary of Cost Proposals (included herein as Attachment 12).

²⁴ H.R. Rep. No. 104-458, at 134 (1996).

²⁵ Federal-State Joint Board on Universal Service, *Recommended Decision*, 12 FCC Rcd 87, 321 (1996) (emphases added) ("*Recommended Decision*").

*obligated to operate. We concur with this policy, noting only that price should be the primary factor in selecting a bid.*²⁶

From the foregoing, it is abundantly clear that price “should be” the primary factor in determining cost-effectiveness – *nowhere did the Commission state in the Universal Service Order or in the plain language of Section 54.511(a) adopted pursuant thereto that price “must be” the primary factor.*

Had Congress, the Federal-State Joint Board or the Commission so desired, any of them could have determined that price “must be” the primary factor. But, true to the objectives of maximizing flexibility and allowing funding applicants to consider other factors, each governmental unit carefully reasoned that price “should be” the primary factor in determining cost-effectiveness – an aspirational standard that clearly affords applicants like the District some degree of leeway in selecting its service providers.

It is critical to correctly analyze the construction of Section 54.511(a). The first sentence states the general standard, that schools “must select the most cost-effective service offering.” The second sentence begins “[i]n determining which service is the most cost-effective,” and then lists the factors that “may” and “should” be considered. Properly construed, in order for the rule to have meaning, the qualifying language relating to the “cost” element or the “effectiveness” element in the second sentence cannot itself be mandatory. Stated another way, if the general “cost-effective” standard and the “price” factor are both mandatory, there is nothing left of the “effectiveness” factor – cost-effectiveness and price would thus become equivalent, though one is clearly intended to help “determine” the other. Surely, this is not what the Commission did

²⁶ Federal-State Joint Board on Universal Service, *Report and Order*, 12 FCC Rcd 8776, 9029 (1997) (“*Universal Service Order*”), as corrected by Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Errata*, FCC 97-157 (rel. June 4, 1997), *affirmed in part*, *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) (affirming *Universal Service Order* in part and reversing and remanding on unrelated grounds), *cert. denied*, *Celpage, Inc. v. FCC*, 120 S. Ct. 2212 (May 30, 2000), *cert. denied*, *AT&T Corp. v. Cincinnati Bell Tel. Co.*, 120 S. Ct. 2237 (June 5, 2000), *cert. dismissed*, *GTE Service Corp. v. FCC*, 121 S. Ct. 423 (November 2, 2000) (emphasis added) (footnotes omitted).

not intend to eliminate any consideration of effectiveness in the competitive bidding process when it carefully crafted Section 54.511(a).

Despite the Commission's clear directives and the plain meaning of the rule, SLD nonetheless erroneously concluded that "[a]pplicants may take other factors into consideration, but in selecting the winning bid, price *must be* given more weight than any other single factor."²⁷ This characterization of the legal standard contravenes Congressional intent, which required only that the pricing be "fair, reasonable and affordable," contravenes the express language in the *Universal Service Order*, and contravenes the plain language of Section 54.511(a). As the description of the facts recited above indicates, the District did consider price along with other criteria, consistent with the competitive bidding requirements, and selected the most cost-effective vendors.

In effect, the SLD turned the legal standard upside down, and the *SLD Decision* should be reversed on that basis alone.

2. The SLD Improperly Relied on *Ysleta* in Denying the District's Funding Request.

The SLD cites *Ysleta* to support its decision to deny the District's funding request.²⁸ This reliance is misplaced. At the time the District made its funding request, the *Ysleta* case had not yet been decided. As a result – and without questioning here whether *Ysleta* properly interpreted Commission rules – the District relied on the plain language of Section 54.511(a) and existing decisions, most prominently the *Tennessee Order*²⁹ decided in 1999. In that case, the Commission followed its rules and the rationale underpinning those regulations in finding that

²⁷ *SLD Decision* at 2 (emphasis added).

²⁸ *Id.*

²⁹ *In the Matter of Request for Review by the Department of Education of the State of Tennessee of the Decision of the Universal Service Administrator*, CC Docket Nos. 96-45 and 97-21, Order 14 FCC Rcd 13734, 13740 (1999) ("*Tennessee Order*").

the Tennessee schools adequately considered price, as well as other factors, in selecting the most cost-effective bid. Citing the *Universal Service Order*, the Commission stated that:

other factors, such as “prior experience, personnel qualifications, including technical excellence, and management capability, including schedule compliance,” form a “reasonable basis on which to evaluate whether an offering is cost-effective.” The Commission later reaffirmed its position that “schools . . . are not required to select the lowest bids offered, although the Commission stated that price *should be* the “primary factor.”

* * *

Interpreting the Commission’s competitive bid rules as requiring schools to select the lowest bid with little regard for the quality of services necessary to achieve technology goals would obviate the ‘maximum flexibility’ the Commission expressly afforded schools.³⁰

The *Tennessee Order* stated without equivocation that price “should be” the primary factor. Although the *Tennessee Order* was ambiguous on whether price should be “a” factor or “the” factor, this lack of clarity has no bearing on the operative verb that defines an applicant’s rights – that it “should” consider price, not that it “must.” The *Tennessee Order* thus parroted the Commission’s rules, and the District had every reason to rely on its applicability in making its Year 2003 funding request.

Moreover, the application forms (Forms 470 and 471) and the online instructions and FAQs available at the time of the Year 2003 applications gave little or no guidance on how much relevance price should or must play in the competitive bidding process, or the process schools should or must use to show the extent to which price was considered.

To the extent *Ysleta* clarified certain aspects of the *Tennessee Order* in December of 2003, any change in the interpretation of Section 54.511(a) cannot be retroactively applied to the detriment of the District. First, by its terms, the Commission did not intend for *Ysleta* to apply retroactively. The Commission expressly acknowledged that it was establishing a new standard, stating that:

³⁰ *Id.* at 13737 (emphasis added) (footnotes omitted).

To strengthen the consideration of price as “the primary factor” in the competitive bidding process, *we hereby depart from past Commission decisions* to the contrary and clarify that the proper reading of our rule, in light of the Commission’s longstanding policy to ensure the provision of discounts on cost-effective services, is that price *must be* the primary factor in considering bids. Applicants may also take other factors into consideration, but in selecting the winning bid, price *must be* given more weight than any other single factor. When balancing the need for applicants to have flexibility to select the most cost-effective services and the limited resources of the program, we conclude that requiring price to be the single most important factor is a rational, reasonable, and justified requirement that will maximize the benefits of the E-rate discount mechanism, while limiting waste, fraud, and abuse.³¹

Notwithstanding the acknowledged departure from past decisions, the SLD held the District to the new *Ysleta* standard, even though the District conducted its competitive bidding and filed its application well *before* *Ysleta* was released.

Second, if allowed to stand, the *SLD Decision* would subject the District to a change in policy for which adequate notice was not provided. Courts and the Commission have held that explicit, advance notice of changes in application procedures must be provided before an application can be dismissed without an opportunity to cure.³² In the absence of any notice that the Commission had adopted a new interpretation – the change from “should be” to “must be” – denial of the District’s funding request would be arbitrary and capricious.

Similar circumstances were at issue in *Salzer v. FCC*.³³ In that case, the Commission adopted rules imposing a “letter-perfect” acceptability standard for LPTV applications, and revised FCC Form 346 to contain questions pertinent to the new requirements (although FCC Form 346 was not available). Subsequently, the Commission released a public notice containing a draft of the “new” FCC Form 346 as well as a supplemental form to be used with the “old” form pending availability of the “new” form. The *Salzer* application was filed on “old” FCC

³¹ *Ysleta* at 26429 (emphases added) (footnotes omitted).

³² See, e.g., *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1560 (D.C. Cir. 1987); *Green Country Mobilephone v. FCC*, 765 F.2d 235 (D.C. Cir. 1985); *MetaComm Cellular Partners*, 4 FCC Rcd 4452 (CCB 1989).

³³ *Salzer v. FCC*, 778 F.2d 869, 875 (D.C. Cir. 1985).

Form 346, but without the supplemental form. The Commission dismissed the application, but the Court of Appeals reversed the Commission and ordered the application to be reinstated. The Court held that the Commission had not specifically stated that the information must be contained in the initial application, stating that:

The unavailability of a revised version of Form 346 and the ambiguous language of the Lottery Report and Order combined to mislead applicants with regard to the necessary timing and form of the required submissions.

* * *

The FCC cannot reasonably expect applications to be letter-perfect when, as here, its instructions for those applications are incomplete, ambiguous or improperly promulgated.³⁴

Similar circumstances are present here. At the time it filed its funding request, the District had every right to rely on the *Tennessee Order* – later deemed to be “ambiguous” – and instructions to FCC Form 470 that did not provide the District with guidance on the importance of price in the selection process. And, since *Ysleta* post-dated the filing of the District’s funding request and admitted that it “departed” from past decisions on which the District reasonably relied, the SLD’s application of the new, stricter standard cannot withstand scrutiny.³⁵

Indeed, the Commission recently conceded that applicants lacked the requisite guidance. In August 2004, the Commission amended its rules to add a new certification to FCC Form 470, in order “to emphasize that applicants must make cost effective service selections consistent with the *Ysleta Order*.”³⁶ The new rule requires all applicants to certify that: “All bids submitted will be carefully considered and the bid selected will be for the most cost-effective service or equipment offering, with price being the primary factor, and will be the most cost-effective means of meeting educational needs and technology plan goals.” Needless to say, this

³⁴ *Id.* at 875.

³⁵ In sharp contrast to *Ysleta*, the SLD did not question the District’s competitive bidding process, which complied in all respects with the Commission’s rules.

³⁶ *Fifth Report and Order* at 15831.

certification would not have been deemed necessary if the Commission's decisions and instructions were clear.

3. Assuming *Arguendo* the SLD Applied the Correct Legal Standard and Did Not Do So Retroactively, the Facts Demonstrate that the District Used Price as the Primary Factor in the Selection of Its Service Providers and the Award of E-rate Projects.

Even assuming that the *SLD Decision* rests on firm legal grounds, it is clear that price was the primary factor throughout the District's extensive competitive bidding process. The following facts provide convincing proof that price was the primary factor, both in the District's overall process, and in the steps leading up to the District's selection of its four service providers and the subsequent award of E-rate funded projects to these service providers:

- The District required potential bidders to have valid CMAS contracts, thereby ensuring that the District would receive, at a minimum, goods and services at prices that had already been competitively bid. Because this was an absolute requirement, we have estimated that this factor accounted for 75% of the District's evaluation in the prequalification process.
- In the second and third steps of the District's process to select its service providers, pricing was the second-highest factor, accounting for 20% of the available points. Technical proposals received 33% of the available points. However, technical proposals were not considered at all in the prequalification. When the first three steps of the District's process are viewed in total, we estimate that price accounted for approximately 40% of the total evaluation.
- After the District selected its four service providers, the District requested new pricing proposals from the service providers, and realized significant cost savings that ranged from 27% to 50% over the service providers' original bids.
- The District awarded the package of schools eligible for 80% funding to the lowest bidder.
- The District awarded the four package packages of 25 schools eligible for 90% funding based upon several unquantified factors. We estimate that these packages were awarded on an evaluation that allotted 40% of the evaluation for pricing, 30% for vendor availability to match the anticipated construction schedule and 30% for past experience with the service provider and the service provider's reputation.

It is clear when looking at this entire process that pricing was the District's one overriding -- and

therefore primary -- factor in selecting its service providers and awarding projects.³⁷

C. If the Commission Does not Reverse the *SLD Decision*, It Should Waive the Requirements of Section 54.511(A).

It is clear that the District complied with the competitive bidding requirements that were in place when the District submitted its Year 2003 application. However, if it is somehow determined that the District was required to show that “price must be the primary factor” in selecting its service providers, the Commission should waive this stricter interpretation and afford the District an opportunity to obtain E-rate funding for Year 2003.

The Court of Appeals has stated that “[a] rule may be waived where the particular facts make strict compliance inconsistent with the public interest. . . . In sum, a waiver is appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule.”³⁸

Applying these principles, the Commission in *Ysleta* waived the rules regarding the filing window for Funding Year 2002. The Commission explained that:

We think that it is appropriate to consider [confusion] with regard to the instant appeals, however, as they involve the application of our rules to a unique situation. . . . We have previously considered an applicant’s good faith reliance in deciding whether to grant a waiver of our rules. Here, we think that such consideration is appropriate because enforcement of these rules in these circumstances would impose an unfair hardship on these applicants. Accordingly, in light of all these factors, we find that it is in the public interest to grant a waiver of our rules in the novel situation posed by the instant case.³⁹

At least the same lack of clarity existed for the District here. Like the applicants in *Ysleta*, the District was subject to the plain language of Section 54.511(a), the ambiguity of the

³⁷ The District’s thorough process stands in marked contrast to the situation in *Ysleta*, where *Ysleta* “did not seek pricing information from bidders concerning products and services”, where “prices of actual services [that would be provided by the bidders] were never compared,” and where “the only dollar figures that *Ysleta* compared in its determination of cost effectiveness were the hourly rates” of proposers’ employees. See *Ysleta* at 26413, 26416 and 26417.

³⁸ *Northeast Cellular*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

³⁹ *Ysleta* at 26438 (footnotes omitted).

Tennessee Order and the lack of guidance on FCC forms and the Commission's web site.

Significantly, the District also did not have *Ysleta* upon which to rely. Based on the available information and its own procurement obligations, the District conducted a thorough competitive bidding process. In these circumstances, strict compliance with the Commission's guidance subsequently provided in *Ysleta* would be "inconsistent with the public interest."

Additionally, the Commission should consider the "hardship, equity, [and] effective implementation of overall policy" applicable here. First, denial of the Year 2003 application after the window closed for Year 2004 and Year 2005 applications places an enormous hardship upon the District because the District is now precluded from applying for E-rate funding for these projects until Year 2006. Second, since the District obviously considered pricing to be of such paramount importance, it would be equitable to waive strict compliance with the *Ysleta* Order. Finally, the District's thorough procedure clearly ensured the "effective implementation of [the Commission's] overall policy" for competitive bidding.

Finally, the Commission has often stated that the overall goal of the E-rate program is to "maximize the benefits of the E-rate discount mechanism, while limiting waste, fraud, and abuse."⁴⁰ By undertaking such a thorough competitive process, the District maximized the benefits of the E-rate discount mechanism and limited any potential for waste, fraud or abuse.

III. CONCLUSION.

The SLD applied the wrong legal standard in reaching its decision, incorrectly holding the District to a higher standard – that price "must be the primary factor." In confusing the general mandatory requirement of cost-effectiveness with the qualifying factor of price used to help "determine[e]" cost-effectiveness, SLD reached the wrong decision, since the facts indisputably demonstrate that, at a minimum, the District selected the most cost-effective

⁴⁰ *Id.* at 26429 (footnotes omitted).

provider and gave great weight to pricing. Moreover, the SLD apparently adopted a “new” standard in *Ysleta* and applied that standard retroactively, to the detriment of the District. The Commission’s recent change in its FCC Form 470 certification requirement confirms the prior lack of clarity concerning the relative importance of the pricing criterion, providing further evidence that the Commission incorrectly applied a mandatory standard to the consideration of pricing when, in fact, no such requirement existed.

Even so, the District considered price as the primary factor in the selection of the District’s four service providers and in the subsequent award of 35 projects to those four service providers for the Year 2003 application. The District undertook a very thorough process that maximized the benefits of the E-rate discount mechanism, while limiting waste, fraud, and abuse. The Commission should therefore reverse the denial of the District’s funding request and reinstate the District’s Year 2003 application.

If the Commission does not reverse the SLD, it should waive the requirements of Section 54.511(a). Strict compliance with this later-imposed requirement would be inconsistent with the public interest. Furthermore, the SLD’s denial was received well after the close of the application window for Year 2004, and the District is now foreclosed from applying for E-rate funding for these projects until Year 2006. Waiver is therefore appropriate based upon

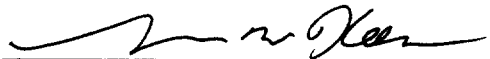
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considerations of the hardship that would be imposed upon the District if the Commission requires strict compliance with the Section 54.511(a) as it now is interpreted.

Respectfully submitted,

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